United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1678 B

To be argued by
JOHN LOGAN O'DONNELL

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

PHILIP ZANE, JEROME E. SILVERMAN, and
ROBERT S. PERSKY,

Defendants-Appellants.

ON APPEAL FROM A DENIAL OF A MOTION FOR A NEW TRIAL OF
THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF DEFENDANT-APPELLANT ROBERT S. PERSKY

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REPLY BRIEF OF
DEFENDANT-APPELLANT
ROBERT S. PERSKY.

POINT I

THE GOVERNMENT MISSTATES BOTH THE APPLICABLE STANDARD FOR THE GRANTING OF A NEW TRIAL AND ALSO THE IMPORTANCE OF THE YAMADA TESTIMONY TO THE GOVERNMENT'S CASE AGAINST ROBERT S. PERSKY

The Government's brief in support of Judge Wyatt's denial of a new trial is guilty of two serious misstatements, one of law, the other of fact. In the first instance, the Government incorrectly announces the applicable standard for the granting of a new trial on the basis of newly discovered evidence to be whether such evidence is "...of such a nature that it would probably produce a different verdict in the event of a retrial." Government Brief, p. 3. The error is further compounded by repetition. See Government Brief, p. 7.

In fact, the relevant standard for the granting of a new trial on the basis of recently discovered evidence is, under the circumstances of the present case, considerably broader. As has been previously noted, in defendant-appellant's main Brief, the law recognizes a distinction between newly unearthed evidence which is merely impeaching and evidence which indicates the

possibility of perjury at trial by a key Government witness. In this latter situation, a looser standard of materiality is applied in order to determine the motion for a new trial; the question the Court must ask is not, as in the cases cited by the Government, whether such evidence "would probably" produce an acquittal in the event of a retrial, but rather, whether such evidence "might" result in a different verdict. United States v. Miller, 411 F.2d 825, 830 (2d Cir. 1969); United States v. Hiss, 107 F. Supp. 128 (S.D.N.Y. 1952), aff'd, 201 F.2d 372 (2d Cir. 1953), cert. den., 345 U.S. 942, 73 S. Ct. 830, 97 L. Ed. 1383 (1953); Larrison v. United States, 24 F.2d 82 (7th Cir. 1928). See also United States v. Johnson, 327 U.S. 106, 111 n. 5, 66 S. Ct. 464, 90 L. Ed. 562 (1946).

In conjunction with misstating the relevant test for appraising the materiality of the newly discovered evidence, the Government, contrary to the facts, attempts to downplay the critical importance to its case of the Yamada testimony, concluding that it was of "secondary value". Government Brief, p. 7. Such an assertion is wholly insupportable: this Court's own opinion states flatly that the alleged conspiracy was "traced at trial

largely through the testimony of Galanis and Yamada". See 495 F.2d 683, 688 (2d Cir. 1974). Furthermore, whatever the value of the Yamada testimony may have been against Zane and Silverman, there can be no question that it was critical against Persky. For example, as detailed in Persky's brief at page 3, no other testimony save for Yamada's could supply Persky's motivation for engaging in the alleged conspiracy. Indeed, the Government concedes the significance of this witness to its case against Persky when, in attempting to demonstrate that Yamada's testimony was of "secondary value", it cites only instances where his testimony against Zane and Silverman, but not Persky, was corroborated.

The jury convicted defendant Persky of complicity in a "Byzantine plot" by an extremely narrow margin. This may be inferred from the fact that Persky was acquitted of the conspiracy, and then, after considerable deliberation and after an "Allen charge" had been given, he was found guilty on the substantive count. Given these facts, and given the extraordinary events which followed, it would gainsay elementary logic to assert that a jury "might" not be swayed by the light that Yamada's subsequent conduct throws on his testimony at trial.

POINT II

THE GOVERNMENT MISSTATES THE RELEVANCE AND IMPORTANCE OF YAMADA'S CONVICTION TO HIS TESTIMONY AT TRIAL

The Government seeks to categorize the fact of Yamada's subsequent conviction as "merely cumulative" and as having only "impeachment" value. This motion, however, cannot be disposed of by such ritualistic incantations; this Court must go behind these catch words and look to substance.

The relevance of Yamada's subsequent behavior to his testimony at trial is amply demonstrated in defendants-appellants' Brief. See pages 11-12. The Government's own sentencing memorandum elaborates further on the striking resemblance between Yamada's fraudulent letter scheme and his testimony at trial, analyzing the extent of Yamada's neurotic suggestibility, his predisposition towards incriminating innocent parties, and his scarcely concealed contempt for the Courts and for the legal process. Indeed, it is impossible to imagine a situation in which a key prosecution witness could discredit himself more dramatically.

The Government impliedly recognizes this fact when it admits in a footnote buried on page 6 of its Brief that Yamada has, as a result of his latest conviction, destroyed his usefulness as a witness. The Government would have us believe, however, that it is only after the fact of Yamada's conviction that his credibility has been obliterated. Such a contention is, of course, irrational; it is not the fact of Yamada's later conviction which renders him useless as a witness, but rather the state of mind which that conviction betrays; and indeed, the same state of mind and the same motivation which led to Yamada's conviction originated at the moment when he first decided to "cooperate" with the Government and thereby escape a prison sentence.

Further, the Government makes much of Yamada's admission, at trial, that he had previously perjured himself before the SEC. This fact, in the Government's view, is sufficient to make Yamada's subsequent crimes "merely cumulative". This ignores the Government's repeated assertions at trial that Yamada, whatever his past sins, was a reformed individual whose first steps in the paths of righteousness would be a truthful recounting of the entire Microthermal transaction.

Moreover, the fact that Yamada's character was exposed at trial as somewhat disreputable does not in and of itself render subsequently discovered character evidence as "merely impeaching". Every witness' character is to some extent put into question at trial. What is important is that sufficient facts be known so as to make the inquiry meaningful. This was not possible at trial, and in light of later developments it cannot be said that Yamada's character was adequately subjected to examination during trial; the only appropriate redress in this situation is a new trial.

POINT III

THE GOVERNMENT MISSTATES THE RATIONALE OF MESAROSH AND FAILS TO DISTINGUISH IT FROM THE INSTANT CASE

The Government seeks to distinguish this case from Mesarosh v. United States, 352 U.S.1, 77 S.Ct.1, 1 L.Ed. 2d 1 (1956), on the ground that Mazzei's testimony in subsequent proceedings was similar in subject matter to that given in Mesarosh's trial, whereas Yamada's later perjuries were thematically unrelated to his testimony at Persky's trial. While it is true that Mazzei, as a paid informant, generally appeared in prosecutions of alleged "Communist subversives", the actual substance of

his testimony was incredibly varied; in one instance he reported that a Communist executioner had been dispatched to liquidate Senator Joseph R. McCarthy. In another, Mazzei asserted that the FBI forced him to plead guilty to charges of "adultery and bastardy" in a Pennsylvania State Court.

In any event, what alarmed the Solicitor General was not, as the Government maintains, the fact that the subject matter of his testimony was similar in each case, but rather that it was increasingly bizzare, far-fetched, and possibly the result of a "psychiatric condition". It was the likelihood that this condition existed at Mesarosh's trial and infected Mazzei's testimony against him which caused the Supreme Court to grant the defendant a new trial.

This is precisely the situation with respect to Yamada; his subsequent behavior betrays an imbalanced and perhaps perverse mentality which, in all likelihood, existed at the time of trial, and which therefore infected his testimony against Persky.

The Government is equally unsuccessful in distinguishing United States v. Chisum, 436 F.2d 645 (9th Cir. 1971). In that case, defendant Chisum was accorded a new trial after it was revealed that the Government agent whose testimony had convicted him had been found guilty of

committing perjury in a trial wholly unrelated to Chisum's. Contrary to what the Government states in its footnote at page 9, this newly discovered evidence had no bearing on factual issues in Chisum's trial, except insofar as it indicated that the Government agents who were responsible for Chisum's conviction had an apparent tendency towards perjury and suborning witnesses, and that they had probably indulged these tendencies during a trial which was contemporaneous with the dates on which Chisum was alleged to have committed the crimes for which he was later convicted. It hardly needs to be added that Yamada's subsequent behavior indicates that he is possessed of substantially similar tendencies.

In short, if ever there were a situation which called for the application of the principles set forth in Mesarosh and Chisum, this is such a case.

CONCLUSION

For all of the foregoing reasons, the District Court's denial of Robert S. Persky's motion for a new trial should be reversed.

Respectfully submitted,

August 9, 1974

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